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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1007

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS TOMLINSON-KATHOL, INC.; WILLIAM T. KEMPER; RAY H. QUACKENBUSH; EUGENE CRABTREE; FRANK E. HEDRICK; THEODORE CARTER; JIM DONHAM; E. DAVIS HICKMAN; JESSIE I. WILCOXON; THE FOURTH NATIONAL BANK AND TRUST COMPANY, WICHITA; WARREN TOMLINSON, GERALD J. KATHOL; OREAD OIL COMPANY; CHARLES AIKENS; JOE HICKMAN; JAMES W. OWENS; RUSSELL COBB, JR.; BARTON OIL COMPANY AND LYDIA E. KEARNS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas and the opinion of The Court of Appeals for the Tenth Circuit are unreported but are both set forth in full commencing on pages 3 and 8 respectively of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether an order staying a federal court equitable action pending the determination of a state court action involving the same factual and legal issues is appealable.

2. Whether a notice of appeal filed October 25, 1968, was timely when the basic order from which the appeal was attempted was entered March 8, 1968, and an order refusing to vacate the March 8 order was entered upon the clerk's docket on September 9, 1968.

STATEMENT

This is the second time petitioner has applied to this court for a writ of certiorari during the course of this litigation. This court denied his first petitions in Nos. 1031 and 1081 of the October, 1968 term on April 1, 1969.

The litigation originated as a purported class action by the filing of a "Petition" in the United States District Court for the District of Kansas on March 3, 1966. (R. 1).* The two plaintiffs, alleging diversity of citizenship, contended that they and the remaining members of a purported class consisting of eight sisters had been defrauded out of their interest in a tract of real property located in Rooks County, Kansas. Plaintiffs claimed that a judgment rendered in a 1944 quiet title action cutting off any right, title, or interest they had in the land had been procured by fraud and that the judgment was void on its face for failure to join indispensable parties.

*References to the certiorari Record are abbreviated herein as "R." and references to the "Petition" as "P."

These respondents (who are the oil and gas lessee of the tract in question and its grantees), together with the owners of most of the mineral and surface interests in the property were joined as defendants. Plaintiffs sought to recover possession of the property, an accounting for and a recovery of profits realized from the land, and damages.

Defendants moved to dismiss the purported class action because the eight-member "class" was impermissably small and was really a device to circumvent the diversity requirements for federal court actions. Three of the other members of the class were Kansas residents as were most of the defendants.

On October 21, 1966, the Honorable George Templar entered his "Ruling on Special Issue of Class Action." (R. 6). Judge Templar agreed with the defendants that the action was not a proper class action, but granted the individual plaintiffs ten days to file an amended complaint in their own behalf.

One week later, on October 28, 1966, defendants D. A. Hindman and Charley A. Lynd commenced a quiet title action in the District Court of Rooks County, Kansas and joined as defendants all the present claimants to the property. These respondents, whose interests do not conflict with those of Hindman and Lynd, are not parties to that action. This second lawsuit will be referred to herein as the "state court action" as distinguished from the instant "federal court" litigation.

Thereafter, on November 1, 1966, an amended complaint was filed in the United States District Court for the District of Kansas by Mary Catherine Shepard, mother of petitioner herein, and by Margaret Christensen. Mary Catherine Shepard subsequently died and petitioner was substituted in this action as plaintiff succeeding to a por-

tion of her alleged interest. (R. 11, 12). Petitioner thereafter had the other claimants to the property joined as "involuntary plaintiffs" notwithstanding their lack of diversity of citizenship from that of defendants.

Plaintiffs in the federal court action were unsuccessful in having the state court action stayed (R. 8) and filed counter-claims in the state court action raising all of the issues presented in the federal court case. The state court action was then tried to the court sitting without a jury, and on September 3, 1968, the Honorable C. E. Birney entered judgment against petitioner and the other defendant-claimants and quieted title (except for an undisputed 3/8 mineral interest) in favor of Hindman and Lynd against the claims of defendants Morse and the other claimants. (R. 29, 30). A motion for a new trial was overruled on October 13, 1968, and petitioner filed a notice of appeal to the Supreme Court of the State of Kansas as had the other defendants. The appeal to the Supreme Court of the State of Kansas is set for oral argument in that court on March 6, 1970.

After obtaining a favorable judgment in the state court action, defendants Hindman and Lynd filed a motion in the federal court action to stay all further proceedings therein pending the state court judgment becoming final. (R. 28). These respondents joined in that motion which was granted by Judge Templar on October 11, 1968. (Page 3 of Appendix to the Petition; R. 32). Petitioner was the only defendant to file a notice of appeal from the stay order and from several other prior orders. (R. 33). This purported notice of appeal was filed October 25, 1968.

Thereafter, on November 12, 1968, the United States Court of Appeals for the Tenth Circuit refused an original application of petitioner for a writ of prohibition or an injunction staying the proceedings in the Kansas courts.

On January 31, 1969, respondents filed a motion to dismiss petitioner's purported appeal to the Court of Appeals for the Tenth Circuit. (R. 46).

On February 10, 1969, and on February 24, 1969 petitioner filed two petitions for a writ of certiorari in this Court (No. 1031 and No. 1081). These petitions were both denied on April 1, 1969, and leave to file petitions for rehearing was also denied by this Court on May 17, 1969.

On September 17, 1969, the motion to dismiss was granted by the Court of Appeals for the Tenth Circuit. (R. 49, 50; Page 8 of the Appendix to the Petition).

On December 17, 1969, petitioner sent a telegram to this Court moving for an extension of time to file a petition for a writ of certiorari. This motion was granted by Mr. Justice White on December 17, 1969, without prejudice to the Court's consideration of whether the motion was filed in time.

In summary, there are two pending cases involving substantially the same issues concerning title to real property in Kansas. The case pending in the Kansas state court has been tried and is set for oral argument before the Supreme Court of Kansas on March 6, 1970. The federal court case has been stayed by order of the district judge, and the Court of Appeals for the Tenth Circuit has dismissed the appeal from the stay order.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit is manifestly correct and completely accords with the well developed body of law on the appealability of stay orders and timeliness of notices of appeals.

2. This action is absolutely unique on its facts, involves no conflict among the various Circuit Courts of Appeals and presents no question of public importance.

3. Petitioner is not entitled to any relief on the merits.

4. The pending appeal in the Supreme Court of the State of Kansas may well finally dispose of petitioner's claims on the merits.

ARGUMENT

I.

The Decision of the Court of Appeals Is Manifestly Correct and Completely Accords with the Well Established Body of Law on Appealability of Stay Orders and Timeliness of Notices of Appeal.

Petitioner is completely in error when he asserts that the action of the Court of Appeals conflicts with decisions of this Court. Indeed, the action of the Court of Appeals directly follows *City of Morgantown, West Virginia* v. *Royal Insurance Co.*, 337 U.S. 254, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949) and *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955). In those two cases, this Court firmly established the principle that the only appealable stay orders are those orders entered staying common law actions pending the outcome of actions of an equitable nature. Among the cases in the various Courts of Appeals following this principle are *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40 (10th Cir. 1967), *cert. denied*, 389 U.S. 829, 88 S.Ct. 92, 19 L.Ed.2d 87 (1967); *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955), *cert. denied*, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955); and *International Nickel Co.* v. *Barry*, 204 F.2d 583 (4th Cir. 1953). Other cases are collected in the recent annotation at 18 A.L.R.3rd 400 (1968).

The rule enunciated by this Court was summarized by Judge Medina in his concurring opinion in *Lyons* v. *West-*

inghouse Electric Corporation, supra, in which the court held that a stay order pending the outcome of a state court appeal was not an appealable order:

> "Thus, we are constrained to conclude from the foregoing that appealability exists in these cases only when there has been 'a stay through equitable principles of a common law action.'" (222 F.2d at 192.)

In the case at bar, it is obvious—petitioner's bald statements to the contrary notwithstanding—that the instant action is primarily equitable in nature so that a "common law action" has not been stayed. Petitioner is seeking in this action to set aside a judgment against his mother because it was allegedly procured by fraud, and he is asking for an accounting of the proceeds from oil and gas operations, for the imposition of a constructive trust on profits derived from the property, for a declaration that the plaintiffs are the owners of the property, and for damages. Obviously, as the Court of Appeals held, petitioner's action is equitable in nature. He does not now have legal title to the property, as any legal title his mother ever had to the property was cut off by the 1944 quiet title action. He can only recover herein if he can establish a right to equitable relief. Petitioner's action is not, as he now claims, an assertion of legal title, his action is an assertion of an equitable right to relief.

The Supreme Court of Kansas, in fact, has held that in an ejectment action wherein the plaintiff based his right to possession on fraud, the action was equitable in nature. *New* v. *Smith,* 86 Kan. 1, 119 Pac. 380 (1911). Accordingly, petitioner is completely wrong in his assertion that the stay order entered in the district court was appealable, and the Court of Appeals was completely correct in granting respondents' motions to dismiss his attempted appeal.

As for the other matters petitioner attempted to include in his appeal, it is abundantly clear that petitioner was simply too late in filing his notice of appeal. The first motion filed in the federal case for an injunction against the state court proceedings was filed by plaintiff Margaret Christensen on April 27, 1967, and this motion was overruled on July 31, 1967. Petitioner then filed substantially the same motion which was overruled on March 8, 1968. (R. 18). Petitioner made no attempt to take an interlocutory appeal from this order.

Instead, petitioner waited nearly six months until September 3, 1968, when he moved the Court to vacate the March 8 order denying the injunction. (R. 27). On September 9, 1968, Judge Templar overruled this second motion by petitioner, and again petitioner made no attempt to take an interlocutory appeal pursuant to 28 U.S.C. §1292. Petitioner waited until October 25, 1968, to appeal from the orders regarding his requested injunction and included these orders in his notice of appeal concerning the stay order.

Petitioner waited too long. Under Rule 58 of the Federal Rules of Civil Procedure, the entry of a judgment or an order on the clerk's docket determines the date when the time for filing a notice of appeal starts to run. As stated by Professor Moore:

> "The term 'judgment', as pointed out, means an adjudicative order that is appealable and hence includes, in addition to a final order, any interlocutory order from which an appeal lies.
>
> "The notation of a judgment by the clerk in the civil docket which he is required by Rule 79(a) to keep constitutes the entry of the judgment. This makes it possible to enter the judgment almost instantly, once the entry is proper. * * *"
>
> (6A *Moore's Federal Practice*, Sec. 58.03 [1], pp. 3506-7.)

Professor Moore goes on to say:

> ". . . (B)oth the time for a direct appeal from the district court to the Supreme Court and time for the more common appeal from the district court to the court of appeals are geared to and begin to run from the entry of judgment. 'Entry of judgment' presupposes, of course, the rendition of a judgment, which is a judicial act, followed by the proper notation of the judgment in the civil docket, which is a ministerial act of the clerk."
>
> (6A *Moore's Federal Practice,* Sec. 58.05 [2], p. 3530.)

Petitioner's notice of appeal not having been filed within thirty days from September 9, 1968, it was clearly out of time.

Even if the date of entry of the order on the clerk's docket did not start the appeal time running, petitioner was still out of time in filing his notice of appeal because the September, 1968, order (or orders as the case may be) overruled his motion to vacate the March 8, 1968 order, and such motions to "vacate," "reconsider," "reargue," and the like cannot extend the time for filing a notice of appeal unless such motion is itself filed within ten days from the date the original order is entered. Both abrogated Rule 73 of the Federal Rules of Civil Procedure and current Rule 4 of the Federal Rules of Appellate Procedure (which went into effect on July 1, 1968—between the dates of the two orders in question) provide that the thirty day period for filing a notice of appeal is only tolled by the *timely* filing of certain enumerated motions, of which the only relevant motion is a motion under Rule 59.

As stated by Professor Moore:

> "The time for appeal is terminated only by a timely motion for judgment n.o.v. under Rule 50(b),

> or to amend or make additional findings under Rule 52 (b), or for a new trial under Rule 59(b), or to alter or amend the judgment under Rule 59(e). A motion which seeks reconsideration, *vacation*, or setting aside of a judgment entered without trial is functionally a motion under Rule 59(e). If it is timely made, i.e., made not later than ten days after entry of judgment, it terminates the running of the time for appeal; *otherwise it has no effect upon the running of the time for appeal.* The precise label attached to a motion is not of critical importance in this context. A motion to 'vacate' or to 'reargue' is effective as a motion under Rule 59(e) *so long as it is timely made.*"
>
> (9 *Moore's Federal Practice*, Sec. 73.09 [4], pp. 3183-3185. Emphasis added.)

Continuing on a few pages later, Professor Moore says:

> "By the express terms of Rule 73(a) only a timely motion under . . . Rule 59 has the effect of terminating the running of the time for appeal. To be timely a motion under one of these rules must be made not later than ten days after entry of judgment. * * * Thus, if no motion of a kind enumerated in Rule 73(a) has been made before the expiration of a period of ten days following entry of judgment, the time for appeal cannot be terminated by motions subsequently filed."
>
> (9 *Moore's Federal Practice*, Sec. 73.09 [4], pp. 3188-89.)

Among the decisions of Courts of Appeals which have followed the above statements are *Yates* v. *Behrend*, 280 F.2d 64 (D.C. Cir. 1960); *Dockery* v. *Travelers Company of Hartford, Connecticut*, 349 F.2d 1017 (5th Cir. 1965).

It should be noted that not only does the decision of the Court of Appeals for the Tenth Circuit thus square with the holdings of other Courts of Appeals and with a leading text writer's statements, petitioner has not cited to this Court any authority calling for any contrary holding

with respect to motions to reargue, vacate and the like. Nor has petitioner even made any argument as to why all of the above holdings and statements are incorrect and should be overruled. To the contrary, petitioner merely attempts to pick himself up by his broken shoelaces by incorrectly contending that his appeal from the stay order was proper so that everything that happened before the date of the stay order can be included in some sort of general interlocutory piecemeal review of the district court's actions. Petitioner completely overlooks both the fact that the stay order is itself unappealable, and that even if it were not unappealable, he would only have commenced an interlocutory appeal limited to the single issue of the propriety of the stay order.

Petitioner is also completely incorrect in his statement under heading 3 on page 11 of the Petition that the Court of Appeals held that the state courts can litigate title to real property over which federal courts are exercising prior jurisdiction. As the opinion of the Court of Appeals clearly shows, the appeal on the questions relative to the jurisdiction of the Kansas state courts was dismissed for the sole reason of not having been timely taken. Nothing in the opinion of the Court of Appeals touches on the question petitioner seeks to raise in this Court.

Indeed, petitioner has rather badly twisted the narrative of the entire course of the litigation in his third section commencing on page 11 of the Petition. He states that the federal district court had already assumed prior jurisdiction over the subject matter of the action when in fact the state court action was commenced prior to the original two plaintiffs filing an amended pleading so as to get back into federal court. Thus, the state court action became the prior action if priority is even involved. Indeed, it is questionable whether priority is involved be-

cause much of the relief sought herein is *in personam* relief, and "exclusive jurisdiction" over a *res* would not be a factor in this action until and unless petitioner succeeds in upsetting the 1944 judgment.

Petitioner has characterized his action as being (at least in part) an ejectment action (pp. 2, 8-9). Ejectment actions are considered to be *in personam* actions so that the rule that the court first acquiring jurisdiction of the *res* does not apply. *Lefkowitz* v. *McQuagge*, 296 F.2d 50 (5th Cir. 1961).

It is clear that *Kline* v. *Burke Construction Company*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), cited by petitioner, is no authority for petitioner's position. Not only does *Kline* not contain any holding that a federal court *must* enjoin a state court that is interfering with the federal court's jurisdiction, it specifically holds that a federal court *cannot* enjoin a state court *in personam* action merely because the same issues are pending before the federal district court.

II.

The Case at Bar Involves a Unique Factual Situation of Concern Only to the Individual Litigants and Is of No Public Importance.

This lawsuit concerns only ownership of a parcel of Kansas real estate and the principal issues are whether a particular quiet title judgment rendered more than twenty-five years ago was fraudulently procured, whether indispensable parties were omitted from that lawsuit, and whether such omission invalidated the judgment. While these questions have economic importance to the litigants, there is nothing of nationwide public interest in any of such questions and the Court of Appeals did not deal with

any of these questions. Such questions are peculiarly "Kansas" in nature and can well be and shall be dealt with by the Kansas courts.

The only questions yet decided by the Court of Appeals concern well established principles of appellate practice. An opinion by this Court on such principles would only be repetitive. No new questions of public importance are presented in the Petition.

III.

Petitioner Is Not Entitled to Any Relief on the Merits.

Although we recognize that this is not the time for this Court to determine questions relative to the merits of the lawsuit, it is appropriate that we summarize briefly why the Rooks County District Court was correct in ruling against petitioner. Petitioner in the state court trial[3] had a full and fair trial, but he simply had no basis for his claims. Basically, his two claims for relief are (1) alleged fraud on the part of his grandmother in inducing his mother and her sisters not to defend the quiet title action and (2) voidness of the judgment because "indispensable parties" were not joined.

As for the claim of petitioner that petitioner's grandmother, Hattie Atherton, fraudulently tricked her children into not defending the 1944 quiet title action, the district judge of the Rooks County district court who heard the evidence on that point said:

> "The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Sheperd, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and pros-

ecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action."

"* * * There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children." (Our Appendix, pp. A7, A8).

The "indispensable parties" contention of petitioner is completely untenable as a matter of law. The three persons petitioner claims were indispensable parties to the action were James E. Atherton (the minor son of the life tenants, George and Hattie Atherton, who conveyed their entire interest in the property to respondents Hindman

and Lynd), Mary Dunlap and Mary Hillman Casey. James E. Atherton died a minor and without issue in 1934 or about ten years before the conveyance and quiet suit in question. Obviously, since his remainder interest, if any, had passed by intestacy to his parents ten years before the commencement of the quiet title suit, he was not an indispensable party.

Similarly, another of the alleged indispensable parties was Mary Dunlap who was the daughter of one of the defendants in the original quiet title action actually served with process. Mary Dunlap had no interest in the property at the time of that suit as her father was still alive and still vested of record with whatever interest might have descended to him, so there was no reason for her to be joined.

Almost exactly the same situation obtains for the third of the so-called indispensable parties, Mary Hillman who is also known as Mary Casey. She was the daughter of Barbara Hillman who was also a named defendant in the 1944 quiet title action. Since any remainder interest would have passed to Barbara Hillman and since there was no conveyance or other document of record transferring her interest to her daughter Mary, there was no reason to join Mary as a party. Clearly, these two daughters of living named defendants had no vested or contingent interest in the property and were not even proper parties to that 1944 action much less indispensable parties.

But even if those three persons were somehow indispensable, the failure to join them would not have made the judgment void as claimed by petitioner. A court that proceeds to try an action that has not had all indispensable parties joined is in error, but the failure to join indispensable parties does not deprive the court of the power to enter a binding judgment over the parties who are properly

joined. *E.g., Doerr* v. *Warner,* 76 N.W.2d 505 (Minn. 1956); *Dyer* v. *Stauffer,* 19 F.2d 922 (6th Cir. 1927), *cert. denied,* 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed. 421 (1927); *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936); *Shields* v. *Barrow,* 17 How. 130, 141, 15 L.Ed. 158 (1855); 2 Barron & Holtzoff, *Federal Practice and Procedure,* §516, p. 163; and 3A *Moore's Federal Practice,* Sec. 19.07-2 [0], p. 2258. Cf., *Bogart* v. *Southern Pac. Co.,* 228 U.S. 137, 146, 33 S.Ct. 497, 57 L.Ed. 768 (1913). Petitioner's mother, from whom petitioner acquired his claimed interest, was a defendant in that action and was properly served with process.

Moreover, purely legal and technical questions relating to the first quiet title action aside, as the learned Kansas district court judge correctly observed, the transaction in which George and Hattie Atherton saved their home from sale at tax foreclosure was entered into in good faith by all parties and with the full knowledge and approval of the eight daughters including petitioner's mother. There was nothing wrongful or fraudulent about any part of the transaction. Years later, after oil production was obtained on the property, the daughters and some of their children apparently have changed their minds and now wish they had found some other way for their parents to keep from losing the family farm for non-payment of taxes. It is too late for such second thoughts, however, and, under familiar legal doctrines of finality of judgments and under equitable doctrines of estoppel and laches, petitioner and his relatives have no basis for their present lawsuits.

IV.

The Supreme Court of Kansas Will Soon Rule on the Merits of Petitioner's Case.

Oral argument of the state court appeal is set for March 6, 1970. That court should therefore announce its decision in April of this year. If the decision of the trial court is affirmed, this litigation will at long last come to an end. If, on the other hand, this Court should grant the Petition and should thereafter command the Supreme Court of Kansas to stay its proceedings, the whole case will have to be tried over again, there will be still another series of appellate proceedings and more years will pass before this case is concluded.

It is most significant that petitioner has not ever mentioned in his Petition how having the case tried in the state court prejudiced him. Nor, for that matter, has petitioner shown this Court that any different result would obtain in a trial in the federal court than obtained in the state court. As we have indicated in the preceding section of this brief, petitioner really has no case on the merits and his alleged right to relief is—like his arguments before this Court—without basis.

CONCLUSION

We have demonstrated that not only is there no reason why this Court should issue the writ requested by petitioner, but that there is no merit to petitioner's basic lawsuit. Respondents therefore earnestly and respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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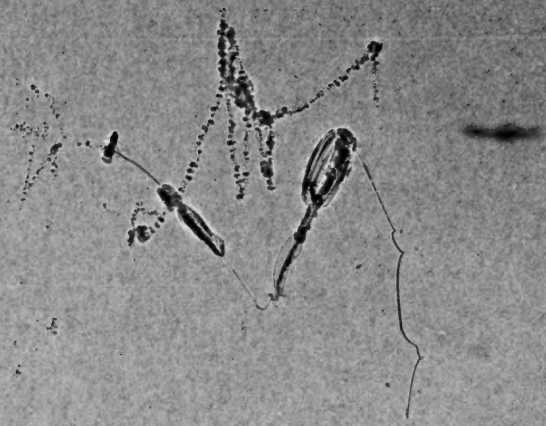

APPENDIX

IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,

Plaintiffs,

vs.

MARY CATHERINE SHEPARD, ET AL.,

Defendants.

No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8th interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8th interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case

No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay

the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided

1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is neces-

> sary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transactions with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8th mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of

limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman, et al.*

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. G. Birney
District Judge